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Mission Produce, Inc. and Retail, Wholesale, and Department Store Union, Southeast Council/UFCW. Cases 10–CA–106374 and 10–RC–095843

February 5, 2015

DECISION, CERTIFICATION OF
REPRESENTATIVE, AND NOTICE TO
SHOW CAUSE

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND HIROZAWA

This is a refusal-to-bargain case in which the Respondent is contesting the Union’s certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed by the Union on June 3, 2013, the Acting General Counsel issued the complaint on June 14, 2013, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union’s request to bargain following the Union’s certification in Case 10–RC–095843. The Respondent filed an answer admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On July 3, 2013, the Acting General Counsel filed a Motion for Summary Judgment. On July 9, 2013, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. No party responded.

The National Labor Relations Board has consolidated these proceedings and delegated its authority in this proceeding to a three-member panel.

The Respondent admits its refusal to bargain, but contests the validity of the certification on the ground that the Board lacked a quorum under *NLRB v. Noel Canning*, 705 F.3d 490 (D.C. Cir. 2013), affirmed in relevant part 134 S.Ct. 2550 (2014), and *Laurel Bay Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009). The Respondent contends that in the absence of a quorum, the Board’s agents and/or delegees lacked the authority to act on the Board’s behalf. Therefore, the Respondent argues, the petition in the representation proceeding was improperly processed, the election was improperly held, the Union should not have been certified, and the matter should have been dismissed.

At the time of the Decision and Certification of Representative in Case 10–RC–095843, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm.

On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, supra, holding that the challenged appointments to the Board were not valid. Under these circumstances, we will not give the prior Decision and Certification of Representative preclusive effect, and we will consider anew the matters raised in the underlying representation proceeding.

In its objection to the election, the Respondent argued for the first time that the processing of the petition was barred because the Board lacked a quorum. The Respondent offers no justification for its failure to make this argument in a timely fashion in the representation proceeding. Indeed, the Respondent not only failed to raise a timely challenge to the authority of the Regional Director, it entered into a Stipulated Election Agreement in which it waived the right to a hearing and expressly agreed to the conduct of a secret-ballot election. Therefore, we reject the Respondent’s arguments as untimely, and we find that the Respondent is estopped from attacking the propriety of an election to which it has expressly agreed. See *ManorCare of Kingston, PA, LLC*, 361 NLRB No. 17, slip op. at 1 fn. 1 (2014).

Moreover, even assuming that the Respondent’s challenge to the Regional Director’s authority was not otherwise barred, the Respondent’s argument is without merit. The delegation to Regional Directors of the authority to enter into Stipulated Election Agreements and conduct elections pursuant thereto is longstanding. See, e.g., *Douglas Aircraft Co.*, 56 NLRB 281 (1944). Congress expressly indicated its approval of this practice in Section 9(c)(4) of the Act. More generally, in 1961, the Board delegated decisional authority in representation cases to Regional Directors pursuant to the 1959 amendment of Section 3(b) of the National Labor Relations Act expressly authorizing such a delegation. Pub. L. 86-257, 86th Cong., 1st Sess., § 701(b), 73 Stat. 519, 542; 26 Fed.Reg. 3911 (1961); see *Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 142 (1971) (by Sec. 3(b) Congress allowed the Board to make a delegation of its authority over representation elections to the Regional Director). This delegation occurred when the Board had a quorum and has never been revoked. Finally, Section 102.178 of the Board’s Rules and Regulations provides that “during any period when the Board lacks a quorum normal Agency operations should continue to the greatest extent permitted by law.” See also Section 102.182 (representation cases should be processed to certification “[t]o the extent practicable”); *The Avenue Care & Rehabilitation Center*, 361 NLRB No. 151, slip op. at 1 fn. 1

(2014); *Durham School Services, LP*, 361 NLRB No. 66 (2014).¹

The Board has considered anew the objection to the election held in Case 10–RC–095843 on February 13, 2013, and the Regional Director’s report recommending disposition of it. As noted above, the election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 5 for and 1 against the Petitioner, with no challenged ballots.

The Board has reviewed the record in Case 10–RC–095843 in light of the exception and brief, has adopted the Regional Director’s findings and recommendations to the extent and for the reasons stated above, and finds that a certification of representative should be issued.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Retail, Wholesale, and Department Store Union, Southeast Council/UFCW, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full time and regular part-time warehouse employees, including packers, stackers, shipping clerks, truck drivers, and QA technicians, employed by Mission Produce, Inc. at 3550 Southside Industrial Parkway, Suite 200, Atlanta, Georgia 30354; but excluding sales employees, office clerical employees, managers, professional employees, guards and supervisors as defined by the Act.

NOTICE TO SHOW CAUSE

As noted above, the Respondent has refused to bargain for the purpose of testing the validity of the certification

of representative in the U.S. Courts of Appeals. Although the Respondent’s legal position may remain unchanged, it is possible that the Respondent has or intends to commence bargaining at this time. It is also possible that other events may have occurred during the pendency of this litigation that the parties may wish to bring to our attention.

Having duly considered the matter,

1. The General Counsel is granted leave to amend the complaint on or before February 17, 2015, to conform with the current state of the evidence.

2. The Respondent’s answer to the amended complaint is due on or before March 3, 2015.

3. NOTICE IS HEREBY GIVEN that cause be shown, in writing, on or before March 24, 2015 (with affidavit of service on the parties to this proceeding), as to why the Board should not grant the General Counsel’s motion for summary judgment. Any briefs or statements in support of the motion shall be filed by the same date.

Dated, Washington, D.C. February 5, 2015

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

¹ In view of the Board’s disposition of the merits of the Respondent’s contentions as described in the text, Member Miscimarra does not reach or rely on the discussion of waiver, *supra*.

(SEAL)

NATIONAL LABOR RELATIONS BOARD